Supreme Court, U. S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-466

In the Supreme Court of the United States

October Term, 1980

AUGUSTUS P. SORIANO,
Petitioner,

vs.

R. L. MOORE, M.D., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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REVISION OF QUESTIONS PRESENTED

1. Whether the District Court properly exercised its discretion by refusing to allow a last minute modification of the pre-trial order and thereby excluding evidence which allegedly would have been introduced pertaining to petitioner's antitrust claim?

2. Whether the granting of the directed verdict in favor of respondents was proper on an antitrust claim based upon respondents' reasonable restriction of petitioner's hospital staff privileges where there was no record evidence of such quality and weight by which fair-minded jurors might have reached a conclusion that respondents' activities generated a substantial effect on interstate commerce or that respondents were motivated by an unlawful purpose?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's *per curiam* opinion in this case.

STATEMENT OF THE CASE

Petitioner applied to the Neshoba County Hospital in 1974 and was promptly admitted to the medical staff at that time with full privileges. After practicing there for approximately one year, during which time he had become involved in a dispute with a nurse-anesthetist, petitioner voluntarily resigned and moved his practice to

a nearby town. (R., Vol. III, p. 417). In 1976, petitioner desired to return to Neshoba County Hospital. After considering his application, the Board of Trustees of the Neshoba County Hospital appointed petitioner to the medical staff and granted him all but 19 of the 374 privileges he had requested.

Petitioner filed a complaint in 8 counts in this case alleging that respondents' actions in restricting his staff privileges constituted violations of his constitutional civil rights and Section 1 of the Sherman Antitrust Act. The District Court proceedings began on June 12, 1978 at which time petitioner's motions for continuance and to supplement the pre-trial order were denied.[1] After hearing all of the evidence, the District Court granted a directed verdict as to the antitrust claim, and the jury rendered a verdict for respondents on all other issues, thus finding that petitioner had not been unreasonably deprived of any staff privileges. The Fifth Circuit affirmed the District Court in a *per curiam* order.

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1. The oral motion for continuance was not made until June 12, 1978. (R., Vol. I, p. 59). The case had been set for trial previously, and the District Court had granted petitioner's motion for a continuance on the basis that petitioner had discharged his previous counsel and employed new counsel who had not had adequate time to prepare. (R. Vol. I, p. 65). Neither respondents' attorneys nor the trial judge were aware prior to June 12, 1978, that petitioner planned to modify the April 17, 1978 pre-trial order with more than one supplemental note of evidence. (R. Vol. I, pp. 60-68).

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the District Court's decision nor the record raises the first question as presented by petitioner.

Petitioner has cited several cases in which it was held that the issue of whether a defendant's conduct has a substantial effect on interstate commerce should be determined "after a thorough exploration of all evidence that either side can produce, rather than by motion to dismiss . . . ." *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Association,* 484 F.2d 751, 759 (7th Cir. 1973). The District Court in this case did not dispose of the issue of jurisdiction under the Sherman Act on a pre-trial motion, but properly directed a verdict for respondents on the issue after concluding as a matter of law that no evidence had been introduced of such quality and weight that the jurors in the exercise of impartial judgment might reach a different conclusion. *Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969). Thus, petitioner has refused to recognize the "important distinction . . . between making a finding that there was sufficient evidence to satisfy the jurisdictional requirements of the Sherman Act after a full trial, and deciding the jurisdictional issue on the basis of an incomplete record presented for purposes of a motion to dismiss." *United States Dental Institute v. American Association of Orthodontists,* 396 F. Supp. 565, 577 (N.D. Ill. 1975).

The first Question Presented in the petition is whether a directed verdict was proper in view of "some record evidence tending to show . . . anticompetitive practices affecting interstate commerce, and . . . where petitioner had been precluded from introducing further evidence. . . ." The facts of record, however, do not support the formula-

tion of this question. The factual predicate in the first Question Presented by petitioner, that record evidence tends to show an effect on interstate commerce, is completely missing from this case. Petitioner's references to the business of the Neshoba County Hospital cannot serve to support this essential predicate, since the hospital has never been a party to this suit and since the District Court correctly held that there was no evidence of record "that the Neshoba County Hospital or any of the . . . defendants were engaged in interstate commerce. . . ." (R., Vol. III, p. 677).

In regard to petitioner's assertion that the record reflects a loss of petitioner's referrals from the Federal Head Start Program, the petitioner testified at trial that he still treats these referral patients and is merely prevented from performing certain surgical procedures on these patients at Neshoba County Hospital. (R., Vol. II, p. 466). Petitioner also testified that his income actually increased from 1974 through 1977. (R., Vol. II, pp. 463-65). Further, there is no evidence in the record that would raise an inference that any of the respondents treat out-of-state patients, or that any of the respondents make out-of-state purchases of supplies as was the case in *Mohammad v. Feminists Women's Health Center,* 586 F.2d 530 (5th Cir. 1979), *cert. denied,* 444 U.S. 924. Thus, the District Court was also correct in finding "a complete absence of any proof that any conduct on the part of any of the defendants substantially affected interstate commerce." (R., Vol. III, p. 677).

Petitioner complains of the District Court's refusal to allow a last minute modification of the pre-trial order so as to allow introduction of additional witnesses and evidence for which respondents' attorneys had not had time to prepare and the refusal to grant a second continuance for this case which had been pending for almost

two years and which had been continued previously on the same grounds of inadequate time for counsel to prepare the case. (R., Vol. 1, p. 64). These pre-trial rulings were within the scope of the District Judge's discretion.[2]

Petitioner states that he was prevented from asking a question "regarding the change in referral policies by some interstate corporations." (Petition, p. 8). The District Court correctly sustained an objection to the question referred to since it called for hearsay from the witness. (R., Vol. I, p. 121). Similarly, the District Court ruled that where the petitioner had failed and refused to supplement his interrogatory answers or to answer deposition questions pertaining to evidence of his income derived from these interstate corporations, petitioner would be precluded from introducing this evidence at trial. (R., Vol. II, pp. 456-463).

Petitioner has confused the issue of whether the District Court made proper procedural and evidentiary rulings prior to the introduction of evidence with the issue of whether the District Court properly granted a directed verdict after considering all evidence which had been admitted during the trial. There was no reversible error in any of the judge's procedural or evidentiary rulings. In any event these rulings are irrelevant to the issue of the propriety of the directed verdict based upon the facts in evidence.

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2. *Burdis v. Texas and Pacific Ry. Co.*, 569 F.2d 320, 323 (5th Cir. 1978) ("decisions concerning variance from the pre-trial order are within the sound discretion of the trial judge as interpreter of the pre-trial order."); *Sanden v. Mayo Clinic*, 495 F.2d 221, 227 (8th Cir. 1974) (refusal to allow a continuance when original attorney withdrew from the case and was replaced by another did not constitute error).

2. The decision below is not in conflict with this Court's unbroken line of decisions defining the jurisdictional breadth of the Sherman Act.

The Fifth Circuit fully considered and correctly decided the issue of whether there was sufficient evidence to present a jury question as to the jurisdictional requirements of the Sherman Act. The decision below is not in conflict with the recent case of *McLain v. Real Estate Board of New Orleans, Inc.*, 48 U.S.L.W. 4063 (1980) or the cases cited therein.

Petitioner has stated that anticompetitive practices in the field of medicine have never been considered by this Court in an antitrust action. (Petition, p. 12). However, in *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952), this Court reviewed a lower court ruling dismissing an action brought to enjoin the Oregon State Medical Society, an Oregon corporation engaged in the sale of prepaid medical care, several county medical societies, and eight doctors from monopolizing the business of furnishing prepaid medical care on a contract basis. This court affirmed and gave the following rationale:

> So far as any evidence brought to our attention discloses, the activities of the [private associations] are wholly intrastate. The government did show that Oregon Physicians Service made a number of payments to out-of-state doctors and hospitals, presumably for treatment of policy holders who happened to move or temporarily be away from Oregon when need for service arose. These were, however, few, sporadic and incidental. . . .
>
> American Medical Ass'n v. United States, 317 U.S. 519, 87 L.Ed. 434, 63 S.Ct. 326, does not stand for the proposition that furnishing of prepaid medical care on a local plane is interstate commerce.

In addition, the various circuit and district courts considering the question have consistently ruled that complaints alleging that hospitals' trustees and staffs conspired to exclude a doctor from their medical staffs in restraint of competition so that potential patients failed to seek the doctor's services did not allege a sufficient effect upon interstate commerce to state a cause of action under the Sherman Act.[3]

Petitioner acknowledges that to establish the jurisdictional element of a Sherman Act violation under the "effect on commerce" theory, the plaintiff must "demonstrate a substantial effect on interstate commerce generated by respondents' . . . activity."[4] However, petitioner cannot in good faith rely upon any evidence in the record to support the argument that the activities of respondents could have had anything more than a remote or incidental effect on interstate commerce.

At trial, petitioner failed to introduce any evidence demonstrating a nexus between the respondents' conduct and interstate commerce. This is a simple case therefore,

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3. *E.g., Harron v. United Hospital Center, Inc.*, 522 F.2d 1133, 1134 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) ("[I]t is frivolous to urge that the employment of a single doctor . . . invokes the Sherman Act. . . ."); *Wolf v. Jane Phillips Episcopal Memorial Medical Center*, 513 F.2d 684 (10th Cir. 1975) (allegation that hospitals' trustees and staffs conspired to exclude plaintiff osteopath from staff in restraint of competition so that plaintiff lost potential patients was insufficient to invoke the Sherman Act); *Sokol v. University Hospital, Inc.*, 402 F. Supp. 1029, 1030 (D. Mass. 1975) ("[I]n isolated instance of the restriction on one doctor's privileges . . . has not been held to violate the Sherman Act. . . .").

4. *McLain v. Real Estate Board of New Orleans*, 48 U.S.L.W. 4063, 4066 (1980); *see Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976) ("as long as the restraint in question 'substantially and adversely affects interstate commerce,' . . . the interstate commerce nexus required for Sherman Act coverage is established.").

of a record that fails to support petitioner's contention that the courts below ignored this Court's expansive interpretation of the jurisdictional reach of the Sherman Act.

3. Regardless of whether the decision below as to jurisdiction is correct, petitioner's argument is without merit.

Any error in granting the motion for the directed verdict would have been harmless. The jury was instructed to return a verdict for petitioner if it found that the defendants had unreasonably deprived petitioner of his staff privileges. (R., Vol. III, pp. 713-14; 721). Since a verdict was returned for respondents, the members of the jury necessarily found that the restraint had been reasonable under the evidence as presented. Thus, any error in directing a verdict for the defendants would have been harmless, since the Sherman Act has been construed to prohibit only those restraints which are unreasonable. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

In *Hatley v. American Quarter Horse Association*, 552 F.2d 646, 653-54 (5th Cir. 1977), the Association's breeding standards were tested under the rule of reason in an action for antitrust violations and denial of due process. The court held that the fact that the district court had specifically found that the Association's rules "were not applied in a discriminatory, arbitrary or capricious fashion" buttressed the appellate court's finding that there was no unreasonable restraint in violation of Section 1 of the Sherman Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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